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No. 02-904

In The
Supreme Court of the United States

FLEMING & ASSOCIATES, L.L.P.,
DAVID JOSE, JAMES BRISTER, PETER MAXFIELD,
AND GEORGE ATALLAH,

Petitioners,

v.

ANDREW S. FASTOW, JEFFREY K. SKILLING,
DAVID B. DUNCAN, AND KENNETH L. LAY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the use of the All Writs Act by the courts below to interfere with parallel state litigation conflict with this Court's narrow construction of the Act; and with other circuits' decisions limiting the circumstances under which courts managing complex litigation may use the All Writs Act in aid of their jurisdiction?

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (plaintiffs in the district court and their counsel) were:

Fleming & Associates, L.L.P.
David Jose
James Brister
Peter Maxfield
George Atallah

The appellees in the court of appeals (defendants in the district court) were:

Andrew S. Fastow
Jeffrey K. Skilling
David B. Duncan
Kenneth L. Lay

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
I. BACKGROUND: ENRON-RELATED LITIGATION	4
II. PROCEEDINGS IN THE DISTRICT COURT	7
III. PROCEEDINGS IN THE COURT OF APPEALS	9
REASONS FOR GRANTING REVIEW	10
THE COURT OF APPEALS EXPANDED THE ALL WRITS ACT TO ALLOW A FEDERAL COURT TO INTERFERE IMPROPERLY WITH PARALLEL STATE COURT PROCEEDINGS	10
A. The Court of Appeals Violated Our System of Dual Sovereignty	10
B. The Decision Below Conflicts With This Court's Decisions Narrowly Construing the All Writs Act	11

TABLE OF CONTENTS – Continued

Page

C. The Decision Below Conflicts With Other Circuits' Decisions Allowing Limited Use of the All Writs Act to Aid Jurisdiction in Complex Litigation 14

1. Introduction 14

2. Modification of the In Rem: In Personam Dichotomy in Complex Litigation 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 11, 12

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) 10

Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877 (11th Cir. 1989) 18, 19

Brown v. Gilmore, 533 U.S. 1301 (2001) 13

Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993) 17

Clinton v. Goldsmith, 526 U.S. 529 (1999) 12

Dombrowski v. Pfister, 380 U.S. 479 (1965) 15

Federal Maritime Comm'n v. South Carolina State Ports Auth., ___ U.S. ___, 122 S. Ct. 1864 (2002) 10

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985) 15, 16, 18

In re BankAmerica Corp. Secs. Litig., 263 F.3d 795 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1437 (2002) 19

In re Corrugated Container Antitrust Litig., 659 F.2d 1332 (Former 5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982) 19, 20

In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220 (3d Cir. 2002) 16

In re Enron Corp. Secs., Derivative & "ERISA" Litig., 196 F. Supp. 2d 1375 (J.P.M.L. 2002) 5

TABLE OF AUTHORITIES – Continued

Page

In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133 (3d Cir. 1998).....17, 18

In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355 (3d Cir. 2001) 16, 18

ITT Community Dev. Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978).....13

Jose, et al. v. Arthur Andersen, L.L.P., et al., No. 2002-CI-01906; in the 57th Judicial District Court of Bexar County, Texas .....*passim*

Kline v. Burke Constr. Co., 260 U.S. 226 (1922).....15, 16

Newby v. Enron, 302 F.3d 295 (5th Cir. 2002), *reh'g and reh'g en banc denied*, ___ F.3d ___, 2002 WL 31115201 (5th Cir. Sept. 11, 2002).....1, 6, 9, 20

Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34 (1985) 12, 13, 14

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).....10

Syngenta Crop Protection, Inc. v. Henson, ___ U.S. ___, 123 S. Ct. 366 (2002).....12, 14

Tafflin v. Levitt, 493 U.S. 455 (1990).....10

Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941).....10

Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 507 U.S. 1301 (1993).....13

United States v. New York Tel., 434 U.S. 159 (1977).....12

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).....16

Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996).....15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 11

Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 11

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (SLUSA) 1

15 U.S.C. § 77p(f)(2) 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a)(1) 2

28 U.S.C. § 1651(a) (All Writs Act) 2, 11, 14

28 U.S.C. § 2283 (Anti-Injunction Act) 2, 14

RULES

TEX. R. CIV. P. 680 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners Fleming & Associates, L.L.P., David Jose, James Brister, Peter Maxfield, and George Atallah respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 302 F.3d 295 (5th Cir. 2002). It is reproduced at App. 1-13.

The opinion of the district court is unreported. It is reproduced at App. 14-23.

JURISDICTIONAL STATEMENT

The court of appeals entered judgment on August 9, 2002. (App. 1-13). Petitioners filed a petition for rehearing en banc, which the court treated as a petition for rehearing and denied on Sept. 11, 2002. (App. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The district court had subject matter jurisdiction over the Enron-related cases pending before it in the consolidated action, *Newby v. Enron Corp.*, pursuant to the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (SLUSA). Therefore, according to the court of appeals, "jurisdiction over the *Jose* state court action was not necessary." (App. 7). The

court of appeals had subject matter jurisdiction under 28 U.S.C. § 1292(a)(1).

STATUTORY PROVISIONS INVOLVED

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a) (All Writs Act).

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (Anti-Injunction Act).

> **(b) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> > **(1)** an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security. . . .
>
> **(f) Definitions**
>
> For purposes of this section, the following definitions apply:
>
> . . . .

> **(2) Covered class action –**
>
> **(A) In general**
>
> The term "covered class action" means –
>
> (i) any single lawsuit in which –
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members . . . or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated. . . .

15 U.S.C. § 77p(f)(2) (SLUSA).

> No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

TEX. R. CIV. P. 680.

STATEMENT

This case merits certiorari because it implicates important federalism concerns in an era of complex litigation. Through its unprecedented expansion of the All Writs Act, the court of appeals permitted a federal court to interfere improperly with parallel state court proceedings. The court's decision conflicts both with this Court's restrictive interpretation of the Act, and with other circuits'

decisions limiting the All Writs Act's use in the complex litigation context.

Petitioners are four Enron shareholders whose counsel, Petitioner Fleming & Associates, L.L.P. (F&A), had brought suit in a Texas state court on their behalf in early 2002, as a result of the Enron financial debacle. Within days, a Texas federal court prohibited F&A from filing any Enron-related actions without its leave, and interfered with Petitioners' lawsuit then pending in the state court. The court of appeals approved such interference.

I. BACKGROUND: ENRON-RELATED LITIGATION

After Enron's bankruptcy in early December 2001 (App. 15), F&A filed six separate Enron-related lawsuits in six different Texas state courts. Among the cases is the one from which this petition arises, which was brought on Feb. 7, 2002, in a state court in San Antonio, Texas. *See Jose, et al. v. Arthur Andersen, L.L.P., et al.*; No. 2002-CI-01906; in the 57th Judicial District Court of Bexar County, Texas (referred to as "*Jose*"). (App. 15).

Because F&A chose to litigate in state court, it filed every suit as a non-class action on behalf of fewer than fifty individuals (four in *Jose*, the underlying case here). (App. 17-18). Each lawsuit advanced only Texas state claims and none sued Enron. Therefore, by statutory definition none of the actions was a securities class action that must be maintained in federal court under SLUSA.

A Texas rule of procedure allows a temporary restraining order to be obtained ex parte if a verified pleading shows that certain conditions have been met. In accordance with

the rule, two TROs, prohibiting document destruction and financial transfers for fourteen days, were obtained without notice in *Jose* and one other state case. As for the other four F&A lawsuits, one TRO was requested with notice, but not granted; one TRO was granted after a hearing; and TROs were not requested in two.[1]

During the period in which F&A was in the process of bringing state suits on behalf of Petitioners and other individual plaintiffs, numerous Enron-related cases were also being brought throughout the U.S. Some lawsuits were filed in state and federal courts in Houston, Texas and its environs because Enron is headquartered in Houston. Houston lies within the jurisdiction of the U.S. District Court for the Southern District of Texas.

In mid-December 2001, days after Enron's bankruptcy, all Enron shareholder cases filed in federal courts throughout the Houston area were ordered consolidated in the U.S. District Court for the Southern District of Texas. (App. 19 n.1). Upon the recusal of another judge, the Southern District consolidated cases were reassigned to the Hon. Melinda Harmon on Jan. 11, 2002. (App. 3).

Three months later, on April 16, 2002, the Judicial Panel for Multidistrict Litigation ordered Enron securities cases coordinated and consolidated for pretrial purposes and designated the Hon. Melinda Harmon as the MDL transferee judge. *See In re Enron Corp. Secs., Derivative & "ERISA" Litig.*, 196 F. Supp. 2d 1375 (J.P.M.L. 2002).

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[1] The record does not support the TRO facts as the court of appeals recited them. (App. 4-5).

As a result of that order, all Enron-related cases filed in federal courts across the nation became subject to transfer to the Houston MDL court for consolidation with *Newby v. Enron* (the first Enron shareholder lawsuit filed in the Southern District of Texas). Many other cases brought in state courts throughout the U.S. were removed – very often with no legal basis – as a precursor to motions requesting their transfer for MDL consolidation. The *Jose* Petitioners' lawsuit was among that group, as were the other five F&A cases.

Most removals, including Petitioners' lawsuit (as well as the five additional F&A cases), were based on the federal securities reform act known by its acronym "SLUSA" (the Securities Litigation Uniform Standards Act of 1998). SLUSA requires that a "covered class action," brought by more than fifty plaintiffs in one case, be maintained in federal court.

The SLUSA removals have been found meritless in each of the F&A lawsuits, and have led to remands of all six actions. In fact, the latest case to be remanded is *Jose*. The action had been removed under SLUSA to the U.S. District Court for the Western District of Texas (App. 26), solely as a predicate for its transfer as a tag-along action to the MDL court. On Nov. 26, 2002, following MDL transfer, the district court ordered *Jose* remanded to the San Antonio state court for lack of subject matter jurisdiction under SLUSA. (App. 26-29).[2]

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[2] In early September 2002, the district court also ordered the remand of four other F&A-filed cases for the same reason. *See Ahlich, et al. v. Arthur Andersen, L.L.P., et al.*, Civil Action No. H-02-0347;

(Continued on following page)

II. PROCEEDINGS IN THE DISTRICT COURT

The federal acts made the subject of this petition occurred in mid-February 2002, one week after suit was filed in *Jose* and while the case was still pending in state court (before having been removed with no legal basis, transferred under MDL, and remanded). At the time, Judge Harmon had been presiding for only one month over those Enron-related cases consolidated in the Southern District of Texas. MDL transfer and consolidation would not occur for another two months. (App. 19 n.1).

Within days of the filing of *Jose* in the San Antonio state court (and two months before MDL consolidation), Respondents Fastow, Skilling, Duncan, and Lay each moved for injunctive relief before Judge Harmon. Essentially, Respondents protested that "substantial defense resources" were being wasted. (App. 22). In other words, they did not wish to be inconvenienced by litigating parallel cases in several Texas state courts, rather than in a single federal court where many Enron-related cases had been consolidated.

Skilling, seeking the broadest relief possible, asked the court to enjoin F&A from filing any additional Enron-related cases without leave of court and to order Petitioners to dissolve the TRO they had obtained in the San Antonio

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Delgado, et al. v. Fastow, et al., Civil Action No. H-02-0673; *Pearson, et al. v. Fastow, et al.*, Civil Action No. H-02-0670; and *Rosen, et al. v. Fastow, et al.*; Civil Action No. H-02-0199. The sixth F&A case, *Bullock v. Arthur Andersen, L.L.P., et al.*, was filed in state court in Washington County, Texas, and removed on two separate occasions to the U.S. District Court for the Western District of Texas. *Bullock* has been remanded twice for lack of subject matter jurisdiction.

court. Respondents' other motions were similar. (App. 14-15). All Respondents requested relief under a combination of the All Writs Act, one or more exceptions to the Anti-Injunction Act, SLUSA, and the court's inherent powers. (App. 19-21).

The district court held an expedited hearing within forty-eight hours (App. 15), and issued a memorandum and order the next day, Feb. 15, 2002. (App. 14-23). The court enjoined Petitioner F&A and those associated with F&A from filing "any new Enron-related actions" without leave. The injunction also ordered F&A to dissolve the TRO then pending in Petitioners' state court case. (App. 22-23). F&A did so by withdrawing its request for a temporary injunction hearing, thus allowing the TRO to expire by its terms. (R.1, Tab 309:577).

According to the district court, by filing and attempting to proceed in several state cases, with the prospect of more to come, F&A had both violated SLUSA and circumvented the court's orders and procedures in the Southern District consolidated cases. Therefore, the court held, it was authorized to enjoin Petitioners under "the All Writs Act, the Anti-Injunction Statute, and its inherent authority, in the spirit of SLUSA and [a 1995 federal securities reform statute.]" (App. 22). And, despite the fact that it had just begun to deal with the Southern District consolidated cases, the court held further that allowing "individual claims" in a "parallel state proceeding" to continue "would interfere with [its] ability to manage effectively the litigation before it." (App. 20).

Several days later, F&A asked the court for permission to file two Enron-related cases in separate Texas state courts. Leave was denied. (App. 5).

III. PROCEEDINGS IN THE COURT OF APPEALS

One week after having been enjoined, Petitioners sought to have the injunction vacated through mandamus. After ordering responses, the court of appeals denied relief in mid-March 2002. (App. 5-6). In so doing, however, it expressed "serious reservations about the propriety of a federal court's prohibition of non-class action filings in a state forum." (No. 02-20206; in the United States Court of Appeals for the Fifth Circuit).

The court of appeals affirmed on Aug. 9, 2002 (App. 1-13), concluding that the All Writs Act granted the district court authority to enjoin F&A from filing future state lawsuits without its permission. (App. 11-12). The court avoided addressing the district court's interference with an ongoing state TRO, however, holding the issue moot because the TRO "was never dissolved and would have expired in any case." (App. 6).

According to the appellate court, the district court did not need an independent source of jurisdiction to enjoin F&A. The court concluded, citing no authority, that jurisdiction was proper over *Jose*, a state case pending within the Western District of Texas, because the district court was then presiding over the Southern District consolidated cases (*Newby*). (App. 7).

REASONS FOR GRANTING REVIEW

THE COURT OF APPEALS EXPANDED THE ALL WRITS ACT TO ALLOW A FEDERAL COURT TO INTERFERE IMPROPERLY WITH PARALLEL STATE COURT PROCEEDINGS

A. The Court of Appeals Violated Our System of Dual Sovereignty

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint. . . . States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, ___ U.S. ___, 122 S. Ct. 1864, 1870 (2002) (citations omitted). The Court's statement in *Federal Maritime Comm'n* merely reiterates that fundamental principle. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

Dual sovereignty extends to the judiciary, making "federal and state courts . . . complementary systems for administering justice in our Nation." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). Because the independence of state courts is essential, "state judicial systems [must be maintained] for the decision of legal controversies." Therefore, "[e]ach system proceeds independently of the other with ultimate review in this Court." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285-86 (1970). To safeguard the system, state judicial proceedings must be respected even when a "duty of 'hands off' by the federal courts" seems inefficient. *See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941).

Proclaiming its "reluctance to adopt an expansive reading" of the All Writs Act and cautioning that "federal courts must be wary of infringing on legitimate exercises of state judicial power" (App. 8-9), the court of appeals agreed that securities cases may be pleaded so as to remain in state court. (App. 11). But despite paying lip service to a dual judiciary, the court approved a federal district court's interference with both ongoing and future state litigation.

The court of appeals' approval of the district court's actions evinces a basic mistrust of the state judiciary and an unwarranted interference with its processes. Therefore, the Court should grant certiorari.

B. The Decision Below Conflicts With This Court's Decisions Narrowly Construing the All Writs Act

The modern All Writs Act has its roots in the 1789 Judiciary Act. *See* Judiciary Act of 1789, ch. 20, §§ 13, 14, 1 Stat. 73, 81-82. Codifications of the original statute were enacted in 1911, 1940, and 1948. The 1948 version of 28 U.S.C. § 1651(a) remains in force today.

Under the All Writs Act, "[u]ninterruptedly from . . . 1789 . . . to the present day . . . the courts of the United States have had powers of an auxiliary nature to issue all writs . . . which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942) (citations and internal quotations omitted). Therefore, aside from requiring an

independent jurisdictional basis,[3] the Act must be employed sparingly: its use must be necessary to the court's jurisdiction. *See id.* at 273 ("[C]ould the issuance of the writ be deemed 'necessary' for the exercise of that jurisdiction?"). A finding of such necessity is rare.

For example, in *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34 (1985), the Court addressed the question of whether U.S. marshals were required to transport state prisoners from state prisons to federal court houses if a statute did not so require. The Court neither detected that requirement in statutory wording nor accepted an argument that the All Writs Act called for the "creative use of federal judicial power" if the statute was unavailing. *Id.* at 40. Although acknowledging that the All Writs Act "empowers federal courts to fashion extraordinary remedies when the need arises," the Court concluded that enlisting the Act was not necessary in this instance: "[The All Writs Act] does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *See id.* at 43. The Court reached its conclusion by examining the language of the All Writs Act,

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[3] That the Act is not an independent source of jurisdiction is a truism. *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, ___ U.S. ___, 123 S. Ct. 366, 370 (2002); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *United States v. New York Tel.*, 434 U.S. 159, 172 (1977). Agreeing that the All Writs Act does not afford independent jurisdictional grounds, the court of appeals cited appropriate authority. But it glossed over the jurisdictional issue – whether a federal court, having just begun to preside over litigation confined to one federal district, may interfere with a state case pending in another federal district ("[J]urisdiction over . . . *Jose* . . . was not necessary."). (App. 7).

its legislative history, and the Court's previous decisions construing the Act. *Id.*[4]

Also declining to find the extraordinary circumstances needed to invoke the All Writs Act, Chief Justice Rehnquist recently denied an application for injunctive relief pending the Court's decision on certiorari. *See Brown v. Gilmore*, 533 U.S. 1301 (2001) (Rehnquist, C.J., in chambers). In refusing to enjoin further implementation of a Virginia statute requiring the observance of a minute of silence in the state's public schools, the Chief Justice noted the following:

> The All Writs Act . . . is the only source of this Court's authority to issue such an injunction. It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "sparingly and only in the most critical and exigent circumstances."

Id. at 1303 (citations omitted); *see also Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (same).

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[4] The court of appeals has also agreed that the use of the All Writs Act is confined to extraordinary circumstances:

> The All Writs Act . . . empowers a federal court to employ procedures necessary to promote the resolution of issues in a case properly before it. This power is limited, however, to the facilitations of the court's effort to manage the case to judgment. . . . Consequently, if a court is able to effect a full and complete resolution of the issues before it without resorting to the extraordinary measures contemplated under the Act, then such measures cannot be employed.

See ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978).

The Court reinforced the rationale behind its earlier All Writs decisions in a very recent case. Once again, the Court refused to enlarge the contours of the Act. *See Syngenta Crop Protection, Inc. v. Henson*, ___ U.S. ___, 123 S. Ct. 366 (2002).

In *Syngenta*, faced with the question of whether the All Writs Act could be used as a source of removal jurisdiction, the Court summarily rejected such an expanded interpretation. Again, as in *Pennsylvania Bureau*, the Court did not allow "resorting to the All Writs Act [to] avoid complying with [in this instance] the statutory requirements for removal." *Id.* at 370.

The court of appeals did not treat the All Writs Act as an extraordinary remedy. Rather, in sanctioning the district court's interference with state court proceedings, it expanded the Act far beyond this Court's bounds. Because the circumstances were neither "critical" nor "exigent," certiorari should be granted.

C. The Decision Below Conflicts With Other Circuits' Decisions Allowing Limited Use of the All Writs Act to Aid Jurisdiction in Complex Litigation

1. Introduction

Given the ever-expanding universe of complex litigation, the use of injunctive powers by a court managing such litigation is not unheard of. Courts presiding over multidistrict or other complex litigation find it necessary at times to protect their jurisdiction – whether under authority granted by the All Writs Act, 28 U.S.C. § 1651(a), or the "in aid of jurisdiction" exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

As the court of appeals recognized (App. 8), the All Writs Act and the "in aid of jurisdiction" exception to the Anti-Injunction Act are statutory analogues. *See, e.g., Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) (because of parallel statutory language, "courts regularly construe the two statutes similarly with respect to their 'aid of jurisdiction' clauses."); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (looking to authority under both statutes). Thus, because case law construing the All Writs Act and the exception is interchangeable, it will be so treated in this petition.

The Anti-Injunction Act exceptions apply only to ongoing state proceedings. *Dombrowski v. Pfister*, 380 U.S. 479, 485 n.2 (1965). In *Jose*, therefore, the district court issued its injunction against further litigation and the court of appeals affirmed under the All Writs Act. (App. 21).

2. Modification of the In Rem: In Personam Dichotomy in Complex Litigation

This Court has long distinguished between in personam and in rem actions with respect to injunctions issued under the All Writs Act (or the "in aid of jurisdiction" exception to the Anti-Injunction Act). The principle stands today: where an action is in personam, or "seeking only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *See Kline v. Burke Constr. Co.*, 260 U.S. 226, 230-31 (1922) (citations omitted). By contrast, where an action is in rem, or dealing with a property dispute, "the effect is to draw to the federal court the possession or control . . . of the res, and

the exercise by the state impairs . . . the jurisdiction of the federal court. . . ." *Id.* at 229.

Therefore, a federal court is prohibited from issuing an injunction to restrain an in personam state action involving the same subject matter from proceeding at the same time as the federal action. *See generally Kline*, 260 U.S. 226; *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) ("We have never viewed parallel in personam actions as interfering with the jurisdiction of either court. . . .").

But over the past few years, courts have expanded the "in aid of jurisdiction" doctrine to encompass in personam actions in the complex litigation arena. Circumstances where injunctions may be appropriate in such situations involve settled or imminently settling class actions; protracted multidistrict litigation in which settlement is imminent; limited fund situations; and the like.

Federal courts have broadened the jurisdictional doctrine because "[w]here complex cases are sufficiently developed, mere exercise of parallel jurisdiction by the state court may present enough of a threat to the jurisdiction of the federal court to justify issuance of an injunction." *See In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 235 n.12 (3d Cir. 2002); *see also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (noting the extension of MDL jurisdiction "where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation"); *Winkler*, 101 F.3d at 1202 (same). In other words, such cases present situations analogous to a "res" that a federal court must protect in aid of its jurisdiction, or to be able to manage the litigation. *See In re Baldwin-United Corp.*, 770

F.2d 328, 337 (2d Cir. 1985) (class action so far advanced as to be the "virtual equivalent of a res over which the district judge required full control").

The complex litigation opinions all adhere to the same principles. Each has approved injunctive relief solely to protect a court's long-established management and oversight of complex litigation. Injunctions are granted not to preclude the possible inconvenience occasioned by parallel state litigation, but to prevent a threat to an investment of judicial time and resources. As the cases below establish, federal courts interfere with parallel state proceedings almost always to protect settlements or imminent settlements. Therefore, except for this case, an injunction has never been granted when a court has barely begun to manage complex litigation.

For example, in *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 197-98 (3d Cir. 1993), a federal district court enjoined a parallel class action under the All Writs Act and the analogous Anti-Injunction Act exception. The state class action was filed in a West Virginia court two months after the federal court had provisionally approved a settlement class, and before the federal opt-out period began. The state plaintiffs attempted, by means of the duplicative class action, to have the federal settlement declared unenforceable. The Third Circuit affirmed the injunction, holding such relief necessary to protect the federal settlement, reached after years of negotiations. *Id.* at 204.

By contrast, some years later the same circuit affirmed the denial of an injunction as unnecessary in aid of the district court's jurisdiction. *See In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d

133 (3d Cir. 1998). After a nationwide MDL federal products liability class had been decertified and a settlement rejected, the parties returned to Louisiana state court where a statewide class action was pending. Under the circumstances, the Third Circuit agreed that permitting a state court class action to proceed would not interfere with or impair the district court's jurisdiction. *Id.* at 144-45. The court properly distinguished those cases in which injunctions were upheld because they involved settlements or imminent settlements. *Id.* at 145.

Employing the same reasoning, the Third Circuit affirmed an injunction, issued under the All Writs Act and the Anti-Injunction Act exception, against two Prudential policyholders who filed a state deceptive sales practices lawsuit after opting out of a settled MDL class action. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355 (3d Cir. 2001). The appellate court concluded the injunction was proper because the policyholders were attempting to use evidence in the state suit that pertained to claims released in the settlement. *Id.* at 369-70.

And in *In re Baldwin-United Corp.*, the Second Circuit affirmed an injunction issued under the All Writs Act against some thirty states. Although eighteen class actions had settled after two years of negotiations and were awaiting final judicial approval by the MDL court, the states indicated that they intended to sue the same group of broker-dealer defendants for additional damages. The injunction was upheld as necessary and appropriate in aid of the MDL court's jurisdiction. 770 F.2d at 338.

Likewise, in *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989), an injunction was affirmed partially in aid of the court's jurisdiction. The plaintiffs in

a state antitrust class action had been members of a federal class action that had settled after seven years of complex antitrust litigation. In upholding the injunction, the Eleventh Circuit concluded that "it makes sense to consider [the] case, involving years of litigation and mountains of paperwork, as similar to a *res* to be administered" because "[a]ny state court judgment would destroy the settlement worked out over seven years. . . ." *Id.* at 882 (internal quotations omitted).[5]

The decision of the Fifth Circuit Court of Appeals in *Jose* cannot be reconciled with the decisions of the many circuits discussed above; it materially conflicts with every opinion.[6] First, contrary to other circuits' opinions, there

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[5] The Eighth Circuit falls in line with the others. In *In re Bank-America Corp. Secs. Litig.*, 263 F.3d 795 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1437 (2002), the appellate court affirmed an injunction granted against several competing state class actions. But the affirmance was based only upon the statutory authorization exception to the Anti-Injunction Act. In fact, the court emphasized that because the federal and state class actions were both in personam proceedings the injunction did not fall within the "in aid of jurisdiction" exception. *See id.* at 801.

And the Seventh Circuit reiterated the principle that injunctive relief is proper "[w]here a litigant's success in a parallel state court action would make a nullity of the district court's ruling, and render ineffective its efforts effectively to manage the complex litigation at hand. . . ." *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996). Nonetheless, the appellate court vacated the lower court's injunction (entered after some years of MDL litigation) because the extraordinary remedy was not necessary to protect a discovery ruling. *Id.* at 1203-04, 1206.

[6] The court of appeals' decision conflicts with its own precedent as well. *See In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (Former 5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982). In that case, the Fifth Circuit affirmed an injunction prohibiting a competing state class action from continuing. The district court had certified over fifty

(Continued on following page)

was no potential settlement to have been jeopardized here. Indeed, a settlement is not on the horizon yet. That is because, unlike the advanced procedural stage of each of the other cases, when the district court issued the order in *Jose*, the *Newby* litigation was in its infancy. The court had just begun managing the Enron cases that were confined to the Southern District of Texas; and MDL consolidation was still two months away. Therefore, unlike most of the other cases, no class was certified in *Newby* at that time. In fact, a class has yet to be certified.

The above facts are dispositive. The material distinctions they present afford another reason for the Court to grant certiorari.

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private federal antitrust cases, previously consolidated under MDL, as a mandatory class. The injunction was upheld because plaintiffs in the federal multidistrict class proceeded to file a competing state class action presenting state antitrust issues. Moreover, the state court issued an order that would have interfered with settlements then ongoing in the federal class action. *Id.* at 1334-35.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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302 F.3d 295

United States Court of Appeals,
Fifth Circuit.

Mark NEWBY; et al., Plaintiffs,
Fleming & Associates L.L.P., Plaintiff-Appellant,
David Jose; James Brister; Peter Maxfield,
George Atallah,
Appellants,
v.
ENRON CORP.; et al., Defendants,
Andrew S. Fastow; Jeffrey J. Skilling;
David B. Duncan; Kenneth L. Lay,
Defendants-Appellees.

No. 02-20343.

Aug. 9, 2002.

Gregory Sean Jez, George M. Fleming (argued), Sylvia Gerald Davidow, Fleming & Associates, Houston, TX, for all Appellants,

Craig Smyser (argued), Smyser, Kaplan & Veselka, Houston, TX, for Fastow.

Jeffrey William Kilduff, O'Melveny & Myers, McLean, VA, Bruce Hiler, Robert Michael Stern (argued), O'Melveny & Myers, Washington, DC, for Skilling.

Barry Grattan Flynn, Law Offices of Barry G. Flynn, Houston, TX, for Duncan.

James E. Coleman, Jr., Bruce William Collins, Diane M. Sumoski (argued), Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, for Lay.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Fleming & Associates, a Houston-based law firm, and its clients David Jose, James Brister, Peter Maxfield, and George Atallah appeal the district court's order dissolving a temporary restraining order issued by a state court and enjoining Fleming from filing any new Enron-related actions without leave of the district court.

Fleming and its clients argue that the district court lacked authority to enjoin prospective state court actions, that the Anti-Injunction Act barred the district court from doing so, and that the district court abused its discretion in issuing the injunction.[1] We affirm.

I

Fleming has thus far filed at least seven lawsuits in state courts throughout Texas, alleging securities fraud arising out of the business failure of Enron Corporation. Each suit stated claims for fewer than fifty plaintiffs in complaints crafted to avoid the provisions of the Securities Litigation Uniform Standards Act of 1998, which made federal court the exclusive venue for class actions alleging fraud in the sale of covered securities.[2] SLUSA defines a "covered class action" as a single lawsuit in which

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[1] The temporary restraining order expired by its own terms, and the order directing that it be dissolved is not before us.

[2] 15 U.S.C. §§ 77p, 78bb(f).

damages are sought on behalf of more than 50 persons,[3] but Fleming's state court suits were each brought on behalf of less than 50 plaintiffs. Fleming has several hundred additional clients, and has advised this court of plans to file similar state court securities-related lawsuits on their behalf if permitted to do so.

At all relevant times, over 70 cases arising from the Enron collapse have been pending in the Southern District of Texas. Several shareholder suits have been consolidated into a case styled *Mark Newby, et al. v. Enron Corp, et al.* On April 16, 2002, the Judicial Panel on Multidistrict Litigation transferred all such federal Enron-related actions to the Southern District of Texas for pre-trial coordination. On the recusal of another judge, the cases were transferred to Judge Melinda Harmon. As the MDL judge she has ruled on many motions and has been heavily engaged in the considerable task of managing this complex litigation, including the filing of a comprehensive pre-trial scheduling order. Fleming represents clients with claims that are part of the MDL proceedings.

On December 5, 2001 the district court denied an application for a freeze order. Then, on January 23, 2002, the district court ordered defendant Arthur Andersen, L.L.P. to segregate, preserve, and protect all writings and other materials relating to Enron and any Enron-related entities. The district court also ordered depositions of individuals connected with Andersen on topics relating to document and data retention and destruction.

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[3] 15 U.S.C. § 77p(f)(2).

Meanwhile, Fleming filed the first state court suit on November 7, 2001 in Harris County, Texas on behalf of Fred and Marian Rosen, asserting breach of fiduciary duty of loyalty and care.[4] On January 16, 2002, Fleming filed an amended petition on behalf of the *Rosen* plaintiffs, naming 21 new defendants and transforming the action into a state court securities fraud suit. The amended petition requested a temporary restraining order against Andersen to prevent Andersen from destroying Enron-related documents. Two days later, the state court in the *Rosen* case issued an *ex parte* TRO against Andersen.

Eight days later, Fleming filed *Bullock v. Andersen* on behalf of eleven plaintiffs in state court in Washington County, Texas. Among other relief, the *Bullock* plaintiffs sought a TRO against Andersen and former Enron CEO Kenneth Lay concerning the preservation of Enron-related documents. On the same day, the state court issued an *ex parte* TRO against Andersen, granting relief that was identical to the evidence order issued by Judge Harmon in *Newby*.

Five days later, on January 29, 2002, Fleming filed the *Ahlich* suit in Brazos County, Texas. This suit was brought on behalf of 45 plaintiffs, purchasers of an unknown amount of Enron stock. Fleming also sought an identical *ex parte* TRO against Andersen and Lay. Defendants were given no notice of the filing of the suit or the application for a TRO.

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[4] Virtually all the defendants in the state court cases were also defendants in federal cases.

Eight days later, Fleming filed *Jose, et al. v. Arthur Andersen, L.L.P., et al.* in Bexar County, Texas, making essentially the same allegations as the previous suits against the same 37 defendants named in the *Ahlich* suit. Once again, Fleming sought an *ex parte* TRO, which the state court granted on the same day. Fleming provided no notice to defendants before seeking the TRO. The TRO, like the previous orders granted by the state courts, enjoined defendants from destroying, altering, or deleting Enron-related documents. Unlike the others, it also prevented defendants from transferring any property, funds, or assets to third parties not in the ordinary course of their business and from transferring assets out of the United States.

Five days later, Lay and Skilling urged Judge Harmon to enjoin Fleming from requesting further injunctive relief in state court without providing notice to them. After a hearing, the federal district court on February 15 enjoined Fleming from filing any new Enron-related actions without leave of the district court and ordered Fleming to dissolve the TRO obtained in *Jose*. The district court rested its authority to issue the injunction in the All Writs Act, the Anti-Injunction Statute, and its inherent authority.

On February 19, Fleming sought leave to file two Enron-related actions in state court, which the district court denied, noting that Fleming failed to provide the court with copies of the lawsuits that it wished to file. Fleming's motion to file the state court suits did not describe the nature of the injunctive relief sought by Fleming or delineate the allegations made in the suits. On February 22, Fleming petitioned this court for a writ of mandamus, along with a motion for emergency relief

seeking a stay of the district court's order. We denied relief, noting that orders granting an injunction are appealable.

Fleming and the *Jose* plaintiffs now appeal the injunction, arguing that the district court lacked subject matter jurisdiction or the authority to grant it, that the Anti-Injunction Act barred the district court from enjoining state proceedings, and that its issue was an abuse of discretion.

II

As a preliminary matter, we note that Fleming's argument that the district court had no authority to order Fleming to obtain the dissolution of the *Jose* TRO is moot. Under Texas state law, the TRO was effective for only fourteen days,[5] and before the expiration of the fourteen days, Andersen removed the *Jose* action to federal court. Because the TRO was never dissolved and would have expired in any case, this issue is moot and is not likely to occur again.

III

Preliminary matters aside, we turn to the jurisdiction of the district court to enjoin Fleming from filing any new Enron-related actions without leave of the court. The contention here is that the district court's claim of authority to enjoin Fleming under "the All Writs Act, the Anti-Injunction Statute, and its inherent authority" is

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[5] Tex.R. Civ. P. 680.

mistaken. We agree that the All Writs Act and the Anti-Injunction Act do not afford independent grounds for the jurisdiction of the district court.[6] At the same time, the district court plainly had jurisdiction over the actions pending before it in the *Newby* litigation, and jurisdiction over the *Jose* state court action was not necessary.

Similarly, a federal district court can exercise ancillary jurisdiction over a second action in order "to secure or preserve the fruits and advantages of a judgment or decree rendered" by that court in a prior action,[7] but we need not draw upon that power here. It is a given that the district court, with jurisdiction over *Newby*, had subject matter jurisdiction to issue an injunction to preserve and protect its jurisdiction. As we will explain, the district court had the authority to compel lawyers properly before it from engaging in vexatious and needlessly harassing maneuvers that challenged judicial efforts to maintain the cooperative approach essential to preserving fair processes in the complex suit in federal court.

IV

We review the district court's grant of an injunction for an abuse of discretion, and underlying questions of law *de novo*.[8]

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[6] *Regions Bank of La. v. Rivet*, 224 F.3d 483, 493 (5th Cir.2000) (holding that neither the All Writs Act nor the Anti-Injunction Act create jurisdiction).

[7] *Id.; Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir.1992).

[8] *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 419 (5th Cir.2001); *Regions Bank*, 224 F.3d at 488.

Although the Anti-Injunction Act is an absolute bar to any federal court action that has the effect of staying a pending state court proceeding unless the action falls within a designated exception,[9] it does not preclude injunctions against a lawyer's filing of *prospective* state court actions.[10] Even so, we are constrained by the overarching principle that federal courts must be wary of infringing on legitimate exercises of state judicial power.[11] The All Writs Act provides that federal courts may "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[12] The Act contains the same language as the second of the three exceptions in the Anti-Injunction Act, and the parallel "necessary in aid of jurisdiction" language is construed similarly in both the All Writs Act and the Anti-Injunction Act.[13]

Courts have read this language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatened to dispose of property that formed the basis for federal in rem jurisdiction or where the state proceeding threatened the continuing superintendence by

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[9] 28 U.S.C. § 2283.

[10] *Dombrowski v. Pfister,* 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Phillips v. Chas. Schreiner Bank,* 894 F.2d 127, 132 & n. 8 (5th Cir.1990).

[11] *See generally Younger v. Harris,* 401 U.S. 37, 44-45, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

[12] 28 U.S.C. § 1651(a).

[13] *In re Diet Drugs,* 282 F.3d 220, 239 (3d Cir.2002); *Winkler v. Eli Lilly & Co.,* 101 F.3d 1196, 1203 (7th Cir.1996); *In re Baldwin-United Corp.,* 770 F.2d 328, 335 (2d Cir.1985).

a federal court.[14] Here also principles of federalism lie behind our reluctance to adopt an expansive reading of "necessary in aid of jurisdiction," which extends to injunctions against prospective state court proceedings, even though they escape the reach of the Anti-Injunction Act.

At the same time, it is widely accepted that federal courts possess power under the All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions without permission from the court.[15] We have upheld an order enjoining a litigant from bringing any future litigation on any claim arising from a particular fact situation, where the litigant was abusing the court system by harassing his opponents.[16] That order applied to both federal and state suits, and unlike the injunction at issue here, did not invite the plaintiff to seek leave of the court to file suit.

Similarly, federal courts also have the inherent power to impose sanctions against vexatious litigants. In *Chambers v. NASCO, Inc.*,[17] the Supreme Court upheld the imposition of sanctions against a litigant who had repeatedly engaged in bad-faith conduct.[18] The inherent power is limited and interpreted narrowly,[19] and its reach is limited by its ultimate source – the court's need to orderly and

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[14] *State of Texas v. United States,* 837 F.2d 184, 186 n. 4 (5th Cir.1988).

[15] Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2942, at 63-64 (2d ed.1995).

[16] *Harrelson v. United States,* 613 F.2d 114, 116 (5th Cir.1980).

[17] 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

[18] *Id.* at 46, 111 S.Ct. 2123.

[19] *Id.* at 42, 111 S.Ct. 2123.

expeditiously perform its duties.[20] Nonetheless, the Court held that resorting to the inherent power to sanction a vexatious litigant was appropriate where there was repeated bad-faith conduct that was beyond the reach of the Federal Rules of Civil Procedure.[21] Although the sanctions in *Chambers* were limited to attorney's fees and associated expenses, the Court recognized that the outright dismissal of a lawsuit under the inherent power is within the court's discretion.[22]

While the *Chambers* Court held that the inherent power reaches beyond the confines of the court to conduct that does not interfere with the conduct of trial,[23] we recognize that this represents the outer reaches of the inherent power.[24] Given that the district court has power under the All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions,[25] we leave the question of its ability to do so under its inherent power for another day.

The district court in this case was attempting to rein in a law firm that represents over 750 plaintiffs but has artfully avoided the Securities Litigation Uniform Standards Act by filing lawsuits in counties across the State of

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[20] *Id.* at 43, 111 S.Ct. 2123; *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir.1978).

[21] *Chambers*, 501 U.S. at 50-51, 111 S.Ct. 2123.

[22] *Id.* at 45, 111 S.Ct. 2123 (citing *Roadway Express v. Piper*, 447 U.S. 752, 761, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)).

[23] *Id.* at 44, 111 S.Ct. 2123.

[24] *See id.* at 60, 111 S.Ct. 2123 (Scalia, J., dissenting); *id.* at 67, 111 S.Ct. 2123 (Kennedy, J., dissenting).

[25] *See supra* notes 13-14 and accompanying text.

Texas that are not denominated class actions and each with fewer than 50 plaintiffs. Fleming's efforts to avoid the Standards Act are not themselves an abuse of the courts. Certainly that effort would alone not support an order enjoining the filing of state court suits in the future without the district court's permission, as we will explain. The problem is Fleming's unjustified and duplicative requests for *ex parte* temporary restraining orders, without notice to lawyers already across the counsel table from Fleming and engaged in the prosecution and defense of virtually identical claims in federal suits.

V

Fleming did not attempt to provide defendants with advance notice before seeking temporary restraining orders, and the applications for TRO and form orders filed in state court by Fleming indicated on their face that the TROs were sought without notice to the defendants. Fleming ignored defendants' attempts to communicate with them and their requests for notice. The TROs obtained by Fleming granted relief that had already been obtained from the district court in the *Newby* litigation, and in one case provided relief that the district court had denied after a hearing at which all parties were present. Fleming has expressed its intention to continue filing these state court suits and has not agreed to notify defendants before seeking a TRO against them.

In sum, the district court did not err in concluding that Fleming's actions constitute a sufficiently serious and systematic abuse of the courts to warrant the injunction. We hold that the district court had authority under the All Writs Act to enjoin Fleming from filing future state court

actions without its permission and did not abuse its discretion in doing so.

VI

Only this narrowly crafted injunction is before us. The district court retains the authority to modify or dissolve the injunction as this saga plays out. It also has a duty to consider Fleming's requests for leave to file suit in state court. Fleming did not raise or argue before us the district court's denial of leave to file two cases in state court, and the district court properly denied leave based upon Fleming's failure to provide copies of the lawsuits it planned to file or to give assurance that it will cease the *ex parte* tactics.

But the district court cannot predicate future denials of leave solely upon Fleming's desire to avoid the reach of the Securities Litigation Uniform Standards Act. We do not question the filing of suits tailored to avoid federal jurisdiction. Nor do we countenance any preemptive federal dominion. The parallel exercise of state and federal judicial power is inherent in our government of dual sovereignty. This duality, however, offers no shelter to sharp practice from the enforcing arm of the state or federal courts. Nor is zealous duty to a client a cover for rude refusals to afford opposing counsel the common courtesy of notice. That the rules contemplate specific circumstances where *ex parte* relief without notice may be obtained offers no comfort to Fleming. It bears emphasis that when Fleming made the contested state court filings, it was already counsel in the federal proceedings, engaged with the counsel to the same parties in federal court that it sought *ex parte* relief from in state court. The district

court properly saw these moves in state court to be unjustified efforts to harass parties to the federal cases, and viewed its response as not burdening rights to proceed to state court.

The advocate is duty-bound to protect his client's interests, and choices of venue and timing belong to him. But the court has the power, indeed the duty, to remind counsel that they are professionals and order their return to the playing field. This is no matter of rules of fine etiquette. Rather, it is the matter of lawyers as officers of the court conducting themselves in ways that do not impede the work of the courts – the genuine and not false service to their clients. We do not mean to be unduly critical in the sense of singling out the law firm now on the carpet. We are aware that such sharp practice is increasingly common, even among able lawyers as those before us. We have no reason to believe this was other than an unfortunate episode that will not occur again. In any event, the district court had the power and duty to stop it, as she did.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.:
VS.	)	H-01-3624
ENRON CORPORATION, ET AL.,	)	AND CONSOLIDATED CASES
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Pending before the Court are Defendant Kenneth L. Lay's Motion to Enjoin Fleming & Associates, L.L.P. from Seeking *Ex Parte* Relief in State Court and for Sanctions, and Supporting Brief (Instrument No 276) and Jeffrey K. Skilling's Memorandum of Law in Support of Motion for Emergency Injunctive Relief Under the All Writs Act and Imposition of Sanctions on Fleming & Associates (Instrument No. 280). There are also pleadings from Andrew Fastow and David Duncan joining in the requests for relief sought by Messrs. Lay and Skilling.

Lay requests the Court to enjoin Fleming & Associates, L.L.P. from applying for any more injunctive relief in state court in derogation of this Court's jurisdiction without providing this Court and Lay at least three full business days' notice and to award Lay his attorneys' fees incurred in preparing and prosecuting this motion as a sanction for Fleming's prior vexatious conduct.

Skilling requests the Court to go further. He asks the Court to issue an order that mandates Fleming to dissolve the Temporary Restraining Order obtained *ex parte* on

February 7, 2002 in *David Jose, et al. v. Arthur Anderson, L.L.P., et al.* in the 57th Judicial District Court of Bexar County, Cause No. 2002-CI-01906, enjoins Fleming from filing any new Enron-related actions without leave of this Court, and grants defense counsel fees and costs reasonably incurred in the pursuit of this motion and hearing.

The Court held an expedited hearing on both motions on February 14, 2002.

The *Jose* case represents the fifth in a series of lawsuits filed by Fleming & Associates, L.L.P. on behalf of shareholders of Enron Corporation who allege that the defendants defrauded them. The first was filed in Harris County, Texas on November 7, 2001 by plaintiffs Fred A. Rosen and Marian Rosen (*Rosen* litigation). On November 13, 2001 the second suit was filed in the United States District Court, Southern District of Texas by John and Peggy Odam and four other plaintiffs. (*Odam* litigation) This suit alleged federal securities fraud claims against Enron and various Enron officers and directors. After Enron filed a petition in bankruptcy on December 2, 2001 Fleming filed a voluntary non-suit of all the defendants in *Odam*, except Andersen, and non-suited Enron in the *Rosen* litigation. On December 12, 2001 the *Odam* litigation was consolidated with 45 other Enron-related federal court actions in the Southern District of Texas, under the caption *Newby v. Enron Corp., et al.* (*Newby* litigation). On January 24, 2002 the third Fleming Enron suit was filed on behalf of 11 plaintiffs in state court in Washington County, the *Bullock* litigation. This case has been removed to the United States District Court for the Western District of Texas. It sought and received an ex parte TRO against Andersen that was virtually identical to the relief granted by this Court the day before in the *Newby* case. The TRO relief was also granted against defendant Lay.

On January 29, 2002 Fleming filed its fourth Enron-related lawsuit in state court in Brazos County, Texas, the *Ahlich* litigation. This suit was brought on behalf of 45 plaintiffs against 37 defendants. It also sought an *ex parte* TRO against Andersen and Lay. The *Ahlich* litigation was removed to the United States District Court, Southern District of Texas. All of these lawsuits make essentially the same factual allegations against Andersen and approximately 37 Enron officers and directors.

G. Sean Jez of the Fleming firm represented to the Court at a hearing on January 30, 2002 that the firm represented over 750 individuals with filed or to be filed cases against these defendants. To date suits have been filed for approximately 80 of these individuals in different Texas counties and in this federal district court.

The Securities Litigation Uniform Standards Act (SLUSA) provides that certain securities cases are preempted by federal law if they meet the following requirements:

1. The action is a "covered class action" under SLUSA;

2. The action purports to be based upon state law;

3. The action involves a "covered security" under SLUSA;

4. The defendant is alleged to have misrepresented or omitted a material fact; and

5. The alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security.

15 U.S.C. Sec. 77p(b), 78bb(f)(1-2).

Under SLUSA "a covered class action" is defined as:

> (i) any single lawsuit in which –
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . . predominate . . . ; or
>
> (II) one or more named parties seek to recover damages on a representative basis . . . and questions of law or fact common to those persons or members of the prospective class predominate . . . ; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which
>
> (I) damages are sought on behalf of more than 50 persons and
>
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purposes.

15 U.S.C. Sec. 77p(f)(2)(A).

Jez is careful to point out that his suits are not denominated class actions and they do not aggregate 50 or more plaintiffs in any one suit. The inevitable inference is that he thereby hopes to avoid the prohibitions of SLUSA. He readily admits that SLUSA would apply to his suits were they denominated class actions or if he aggregated 50 or more plaintiffs, but adamantly maintains that because they do neither, they are not covered by SLUSA. Thus he concludes that because his cases are not "covered class actions" this Court has no authority to enjoin his lawsuits.

SLUSA was passed in 1998 in order to prevent plaintiffs from evading the procedural safeguards of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. Secs. 77Z-1, 78u (PSLRA) by asserting federal securities fraud claims under the guise of state law. In *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F. 3d 101, 108 (2d Cir. 2001) the Court held that SLUSA "closed this loophole in PSLRA" by "making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law."

Lay and Skilling argue that Fleming should not be allowed, by artful pleading, to circumvent the terms of SLUSA. Clearly SLUSA was enacted to prevent just such gamesmanship, and it is only by Fleming's careful avoidance of the term "class action" and decision to aggregate less than 50 plaintiffs in each of his lawsuits that he does not fit the terms of the statute precisely. Defendants ask the Court to take into consideration that the Fleming firm has acknowledged that it represents more than 750 plaintiffs and has as much as acknowledged that it will continue to file lawsuits on behalf of these plaintiffs, *seriatim*, throughout the State of Texas. In *Prager v. Knight/Trimark Group, Inc.*, 124 F.Supp.2d 229, 233 (D.N.J.2000) the Court described Congress's intention as one "to completely preempt state securities cases alleging fraud or manipulation." *See also, Haney v. Pacific Telesis Group*, No. CV0078AHMMANX, 2000 WL 33400194, at *20 (Sept. 19, 2000, C.D. Cal.) This being the case, Lay and Skilling argue that it is irrelevant what label plaintiff attaches to his claim. The focus should be on the substance of the claim, not on the plaintiff's characterization of it." *Denton v. H&R Block Fin. Advs. Inc.*, No. 01 C 4185,

20001 WL 1183292, at *3 (N.D. Ill., Oct. 4, 2001). Each of the five lawsuits recites essentially the same facts giving rise to essentially the same claims against essentially the same defendants.

Lay and Skilling do not rely entirely on SLUSA for their request for an injunction. They also rely upon the All Writs Act, 28 U.S.C. Sec. 1651 and the exceptions to the Anti-Injunction Act, 28 U.S.C. Sec. 2283. The All Writs Act provides "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Anti-Injunction Act permits federal courts to issue an injunction to stay a state court proceeding "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The All Writs Act grants federal courts broad authority to issue an injunction when "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970). Federal Courts have often invoked the All Writs Act when the federal action involves complex, multi-district litigation[1] and the parallel state action would derogate the federal court's jurisdiction.

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[1] Although this case has not yet been formally declared "multi-district" by the MDL Panel, there is pending a motion before the Panel, and substantially similar lawsuits have been filed in various federal district courts in Texas and other states. The cases filed and consolidated in the Southern District of Texas number over seventy.

In re Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334-4 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982), *Carlough v. American Products, Inc.*, 10 F. 3d 189, 197 (3d Cir. 1993), and *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985).

Under the PSLRA the federal securities class action will be subject to various procedural safeguards that Congress enacted to protect against frivolous filings, such as selection of lead plaintiff and lead counsel and the automatic discovery stay. 15 U.S.C. Secs 77z-1, 78u. These safeguards, mandated by Congress, necessarily result in the federal putative class action proceeding more slowly than any individual parallel state proceeding would. The existence of these individual claims with their own schedules and discovery would interfere with this Court's ability to manage effectively the litigation before it. The Seventh Circuit has held that if the plaintiff's success in a parallel state court action "would make a nullity of the district court's ruling, and render ineffective its efforts to effectively manage the complex litigation at hand, injunctive relief is proper. *Winkler v. Eli Lilly & Co.*, 101 F. 3d 1196, 1202 (7th Cir. 1997). The *Winkler* Court went on to say that "Litigants who engage in forum-shopping, or otherwise take advantage of our dual court system for the specific purpose of evading the authority of a federal court, have the potential 'to seriously impair the federal court's flexibility and authority to decide that case.'" *Id.* at 1203 (quoting *Atlantic Coast Line RR*, 398 U.S. at 295). *Winkler*'s words fit the instant situation.

The Court is also entitled to protect its judgments and orders by enjoining state court proceedings. *Sperry Rand Corp. v. Rothlein*, 288 F. 2d 245, 248 (2nd Cir. 1961). This

Court has issued several Orders and Opinions that warrant protection from the Bexar County *Jose* action and other actions that may be filed seeking similar relief. On January 8, 2002, Judge Rosenthal issued a Memorandum Opinion and Order that denied pre-judgment limitations on the assets of the defendants because there was insufficient evidence to support such a remedy.[2] This Court has already issued an Order prohibiting Arthur Andersen from destroying any additional documentary evidence. To the extent the TRO obtained by Fleming in the Jose case is inconsistent with this Court's Order, an injunction protecting that earlier Order is justified under the All Writs Act.

The All Writs Act and its inherent powers give this Court the authority to enjoin plaintiffs from filing state court actions in order to "preserve the court's ability to effectively rule on matters presently before it, to order meaningful relief with respect to motions pending before it, and to prevent abuse of the justice system." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995) (Lake, J.) See also, *Harris v. Wells*, 764 F. Supp. 743 (D. Conn. 1991). Moreover, the Anti Injunction Act does not curtail the Court's power to limit the commencement of future state court litigation. *Delgado*, 890 F. Supp. at 1374; *Dombrowski v. Pfister*, 380 U.S. 479, 485 n.2 (1965); *United Steelworkers of America (AFL-CIO) v. Bagwell*, 383 F. 2d 492, 495 (4th Cir. 1967).

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[2] Jez disputes the Lay and Skilling characterization of his TRO as a "freeze" on their assets, but regardless of how the TRO in the *Jose* case is characterized, it does operate as a limitation on the defendants' ability to deal with their assets.

The harassing actions of Fleming's law firm have necessitated the waste of substantial defense resources addressing their duplicative and uncalled for TRO's. It is now abundantly clear, contrary to the inferences Jez wished the court to draw from his representations on January 30, 2002, that in the absence of an injunction prohibiting Fleming from filing new actions and seeking emergency relief, Fleming will proceed on a county-by-county basis through the State of Texas filing actions and seeking the same emergency injunctive relief undertaken in the *Bullock*, *Ahlich*, and *Jose* cases. Such behavior underscores its desire to circumvent the orders and procedures established by this Court and threatens to disrupt the orderly resolution of the consolidated *Newby* actions. Such a circumstance would constitute irreparable harm to the defendants for which there is no adequate remedy at law. *See Bruce v. Martin*, 680 F. Supp. 616, 622 (S.D.N.Y. 1988). The Court finds that it has the authority from the All Writs Act, the Anti-Injunction Statute, and its inherent authority, in the spirit of SLUSA and PSLRA, to grant the following relief.

It is hereby ORDERED, ADJUDGED, and DECREED that Fleming & Associations, L.L.P., be, and is hereby, ordered to dissolve the Temporary Restraining Order obtained February 7, 2002 in *David Jose, et al. v. Arthur Anderson, L.L.P., et al*, in the 57th Judicial District Court of Bexar County, Cause No. 2002-CI-01906.

It is further ORDERED, ADJUDGED, and DECREED Fleming & Associates, L.L.P., be and is hereby enjoined from filing any new Enron-related actions without leave of this Court;

This injunction shall be binding upon all attorneys who are partners of or associated with Fleming & Associates, L.L.P., and any other lawyer or law firm acting under its direction, and upon those persons in active concert or participation who receive actual notice of this order by personal service or otherwise.

The issues of sanctions and attorneys fees remain under advisement.

Signed at Houston, Texas, this 15th day of February, 2002, at 5:55 o'clock p.m.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20343

MARK NEWBY, ET AL

Plaintiffs

FLEMING & ASSOCIATES LLP

Plaintiff-Appellant

DAVID JOSE; JAMES BRISTER; PETER MAXFIELD; GEORGE ATALLAH

Appellants

v.

ENRON CORP; ET AL

Defendants

ANDREW S FASTOW; JEFFREY J SKILLING; DAVID B DUNCAN; KENNETH L LAY

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Filed Sep. 11, 2002)

(Opinion 8/9/02, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

Judges King, Garwood, Jones and DeMoss did not participate in the consideration of the rehearing en banc.

REHG-6a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	§	MDL-1446
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
DAVID JOSE, JAMES BRISTER, PETER MAXFIELD AND GEORGE ATALLAH, Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-02-4243
ARTHUR ANDERSEN, ET AL., Defendants.	§	

ORDER OF REMAND

Pending before the Court in the above referenced Enron-related action, H-02-4243, removed from the 57th Judicial District Court of Bexar County, Texas to the San Antonio Division of the United States District Court for the Western District of Texas and transferred to this Court by order of the Multidistrict Litigation Panel, are *inter alia* Plaintiffs' motion to remand (instrument #4) and Defendants' motion to dismiss (instrument #44) on the

grounds that the claims are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, codified as amended in part at 15 U.S.C. §§ 77p and 78bb(f) (1998) ("no covered class action based upon the statutory or common law of an [sic] State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security. . . . ").

This action is another case filed by George M. Fleming and Gregory Sean Jez of Fleming & Associates, brought by plaintiffs individually in state court under Texas state law with fewer than fifty plaintiffs.

As was true of several others, this case does not technically satisfy SLUSA's definition of a "covered class action."[1]

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[1] Title 15 U.S.C. § 78bb(f)(5)(B) defines a "covered class action" as

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominated over any question affecting only individual persons or members or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(Continued on following page)

Furthermore, in its recent ruling affirming this Court's injunction enjoining Sean Jez and the law firm from filing new state court actions relating to Enron without leave of court, the Fifth Circuit made clear that counsel's deliberate efforts to circumvent SLUSA and avoid federal jurisdiction by filing such suits in counties across Texas that did not meet SLUSA's definition "are not themselves an abuse of the courts." *Newby v. Enron Corp.*, 302 F.3d 295, 302 (5th Cir. 2002), *rehearing and rehearing en banc denied*, 2002 WL 31115201 (2002). It further noted that

> the district court cannot predicate future denials of leave [to file state court actions related to Enron] solely upon Fleming's desire to avoid the reach of the Securities Litigation Uniform Standards Act. We do not question the filing of suits tailored to avoid federal jurisdiction. Nor do we countenance any preemptive federal dominion. The parallel exercise of state and federal judicial power is inherent in our government of dual sovereignty.

Id. at 303.

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

Accordingly, the Court

ORDERS that Plaintiffs' motion to remand is GRANTED for lack of subject matter jurisdiction and H-02-4243 is REMANDED to the 57th Judicial District Court of Bexar County, Texas. Because SLUSA does not preempt the claims asserted herein, Defendants' motion to dismiss is MOOT.

Finally, as this Court indicated in its Memorandum and Order entered on May 1, 2002 in *Newby*, H-01-3624 (#577 at 4-6), SLUSA provides for a stay of discovery in any private action in state court where the state court proceedings are being employed to circumvent the discovery stay of the PSLRA. 15 U.S.C. § 78u-4(b)(3)(D). As it has in other cases remanded on the same grounds, in aid of its jurisdiction and to protect and effectuate its judgments in *Newby* the Court

ORDERS that all discovery in the instant remanded case is ENJOINED until this Court has ruled on the motions to dismiss in *Newby*.

SIGNED at Houston, Texas, this 21st day of November, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE